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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

denied

315-873

No. 972

DAVID O'BRIEN,

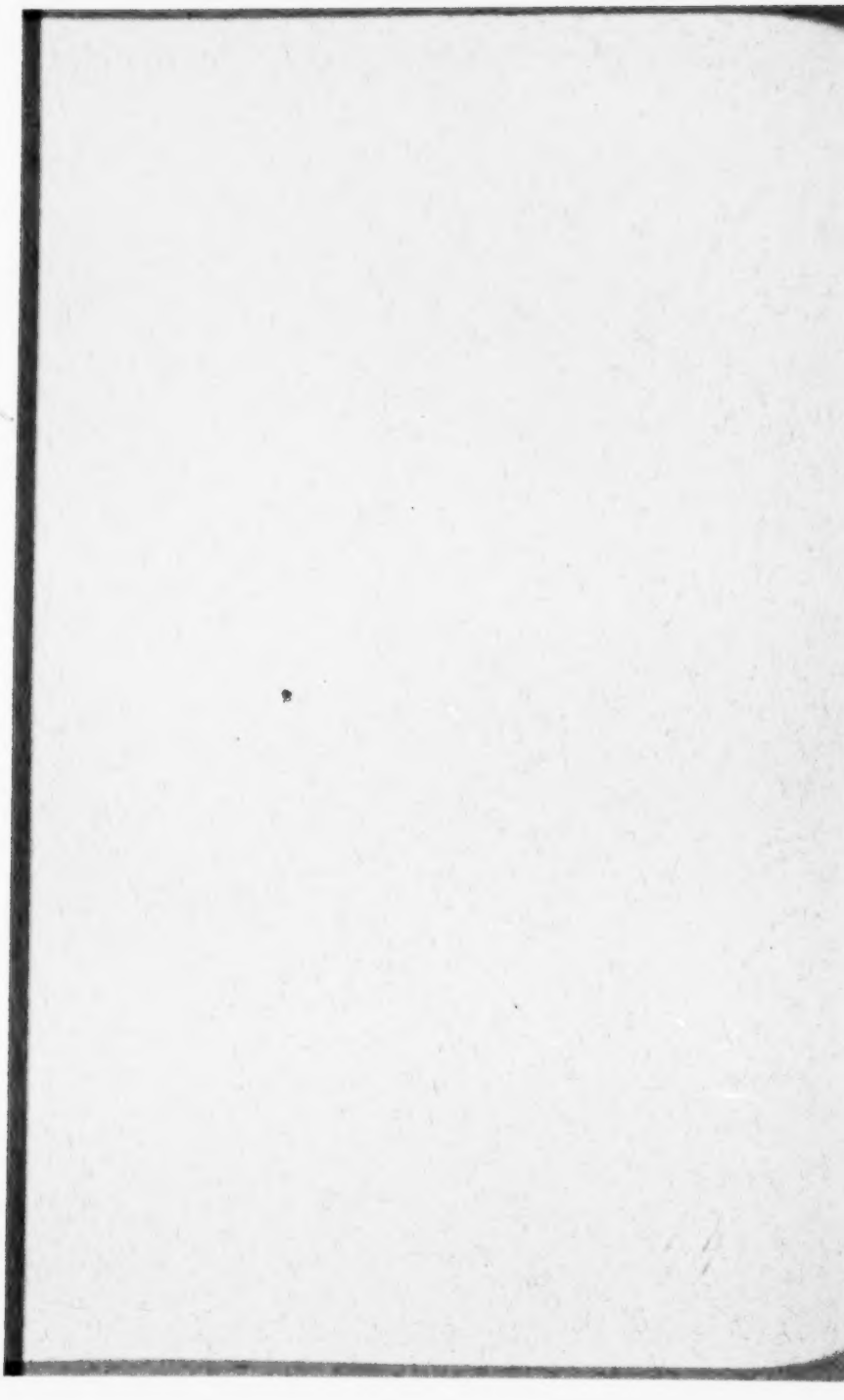
Petitioner,

vs.

PABST SALES COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT G. STOREY,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 972

DAVID O'BRIEN,

Petitioner,

vs.

PABST SALES COMPANY.

PETITION.

To the Honorable, the Supreme Court of the United States:

Comes now David O'Brien, hereinafter styled Petitioner, and, applying for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case.

This suit involves an invasion of Petitioner's right of privacy by the alleged unauthorized use by Respondent of Petitioner's photograph in connection with a football calendar which Respondent published and distributed for commercial purposes (R. 37). Petitioner David O'Brien, according to the undisputed record, was the outstanding college football player for the 1938 season. The football calendar, which was attached to Petitioner's original pleading, discloses that his favorite picture was used in the upper

left hand corner of the calendar, and in the right hand corner, a picture of Pabst Blue Ribbon Beer, both in the can and the bottle, were shown and exhibited by name. In the middle of the calendar was Grantland Rice's All American Team for 1938, which included the picture and name of David O'Brien, the Petitioner. The undisputed evidence disclosed that over 30,000 of such calendars were distributed in forty-one states of the United States, without the consent of David O'Brien. Upon the conclusion of the trial in the trial court, at which Appellant could not be present because he was engaged in training work with the Federal Bureau of Investigation, the trial court instructed verdict in favor of Respondent, assigning as reasons (R. 62 to 64) that Petitioner was such an outstanding public character that there could not be any invasion of privacy in the use of his name and photograph. This judgment was affirmed by the Circuit Court of Appeals on December 4, 1941, by a divided Court, with Mr. Justice Holmes dissenting. A motion for rehearing was duly filed, which was by the Circuit Court of Appeals overruled on January 2, 1942, without a written opinion.

Statement as to Jurisdiction.

Jurisdiction is conferred upon the Supreme Court by Section 347, 28 U. S. C. A. The opinion of the Circuit Court of Appeals is found at page 68 of the Record.

Questions Presented.

I.

Petitioner's right of privacy has been invaded by the unauthorized use of his photograph, and is therefore compensable.

II.

Respondent does not have the right, without authority, to appropriate the photograph and name of Petitioner for

COMMERCIAL PURPOSES, even though Petitioner is a widely publicized football player.

Reasons Relied On for Allowance of Writ.

I.

The opinion of the Honorable Circuit Court of Appeals was by a divided Court, Mr. Justice Holmes dissenting. Since the Court was divided in its opinion, it shows a doubt about the law, and this Honorable Court should take jurisdiction.

II.

The calendar in question shows clearly an implied endorsement of the product by Petitioner, without his consent. The Honorable Circuit Court of Appeals failed to decide this issue.

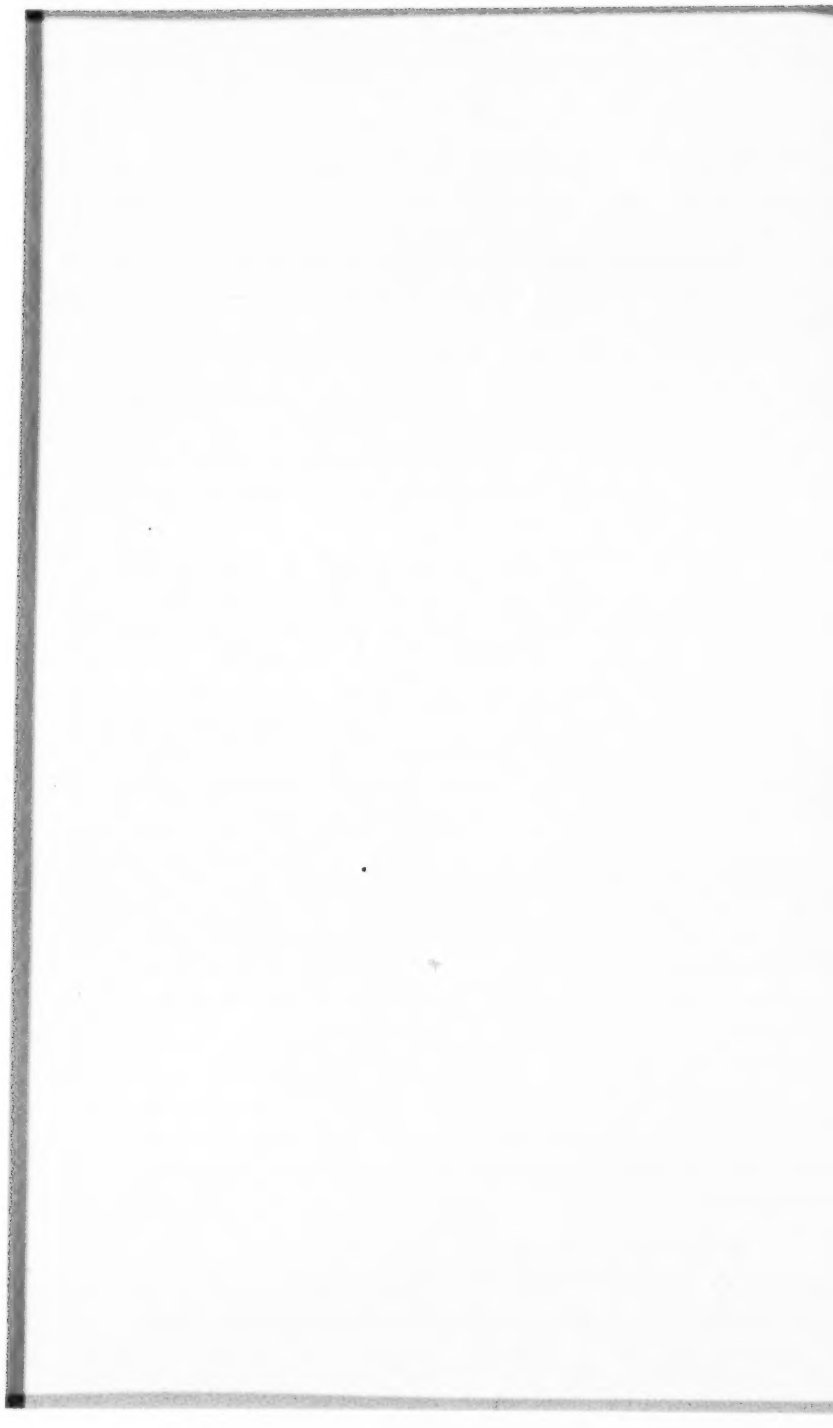
III.

In the majority opinion, the Court was in error in holding that no case of invasion of the right of privacy was pleaded or proved.

WHEREFORE, Petitioner prays that a writ of certiorari issue to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to the Supreme Court, for its review and determination on a day certain, a full and complete transcript of the record and proceedings in cause numbered and entitled on the docket, No. 9892, David O'Brien v. Pabst Sales Company, and that the judgment of the Circuit Court of Appeals and the District Court be reversed; and that Petitioner have such other and further relief in the premises as this Court may deem proper.

Respectfully submitted,

ROBERT G. STOREY,
Attorney for Petitioner.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 972

DAVID O'BRIEN,

Petitioner,

vs.

PABST SALES COMPANY.

SUPPORTING BRIEF.

To the Honorable the Supreme Court of the United States:

I.

Opinions of the Courts Below.

The opinion of the District Court appears in the record, pages 62 to 64; the opinion of the Circuit Court of Appeals is reported at 124 Federal (2d) 167, and appears in the record on page 68.

II.

Jurisdiction.

The opinion of the Circuit Court of Appeals was handed down on December 4, 1941, and the motion for rehearing was overruled January 2, 1942, and the judgment affirming

the decision of the District Court was entered on the same day (R. 76).

Jurisdiction is conferred on the Supreme Court by Section 346, 28 U. S. C. A.

Jurisdiction is invoked on the grounds:

(a) The Circuit Court of Appeals has decided an important question involving the invasion of privacy which has not been, but ought to be, settled by the Supreme Court.

(b) The calendar in question shows clearly an implied endorsement of the product by Petitioner, without his consent. The Honorable Circuit Court of Appeals failed to decide this issue.

(c) In the majority opinion, the Court was in error in holding that no case of invasion of the right of privacy was pleaded or proved.

III.

Statement of the Case.

The facts set forth in the statement contained in the petition are sufficient for the purposes of the brief, and for the purposes of brevity are not repeated here.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in overruling Petitioner's contention that his right of privacy had been invaded to such an extent that he was entitled to compensation therefor.

2. The Circuit Court of Appeals erred in holding that the pleadings and evidence did not permit recovery for invasion of rights or privacy.

3. The majority opinion overruled the contention that there was a question of fact for the jury, especially upon the implied endorsement by the Petitioner of the beer in question.

4. The Circuit Court of Appeals failed to consider the law of forty-one states, as well as Texas, in which distribution of the calendar was made.

5. The Circuit Court of Appeals in the majority opinion overruled Petitioner's contention that he was entitled to compensation for use of his name and picture for commercial purposes.

ARGUMENT.

We believe the dissenting opinion of Mr. Justice Holmes best presents Petitioner's position, and we quote it verbatim:

> "There is no Texas statute of decision directly in point, but I think, under the Texas common law, the appellant is entitled to recover the reasonable value of the use in trade and commerce of his picture for advertisement purposes, to the extent that such use was appropriated by appellee.
>
> "The State of Texas, early in its history,[1] adopted the common law of England, so far as it was not inconsistent with its constitution and laws, and provided that such common law, together with such constitution and laws, should be the rule of decision and continue in force until altered or repealed by the legislature.[2]
>
> "The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity.

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[1] Act of January 20, 1840.

[2] Revised Civil Statutes of Texas of 1925, Art. 1; *Grigsby* v. *Reib*, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E; 1 Ann. Cas. 1915C, 1101; *Great S. Life Ins. Co.* v. *Austin*, 112 Tex. 1, 243 S. W. 778.

"The great property rights created by the demands of modern methods of advertising are of comparatively recent origin, and may not have been in existence in January, 1840, but the common law of Texas is subject to growth and adaptation in the land of its adoption, as well as it was in the country of its origin.[3] The capacity of the common law of Texas 'to draw inspiration from every fountain of justice' has not been diminished by time, though a century has passed since its adoption by the legislature of that state.[4]

"No one can doubt that commercial advertisers customarily pay for the right to use the name and likeness of a person who has become famous. The evidence in this case shows that appellant refused an offer by a New York beer company of $400 for an endorsement of its beer, and the appellee apparently recognized that it was necessary to obtain the consent of the various football players, because it required that releases be obtained from them. This admittedly was not done. The fact that appellant made this stipulation with the publishers of the calendars may save it from the infliction of punitive damages, but cannot relieve it from the payment of actual damages measured by the value of the unauthorized use of appellant's picture.

"Texas statutes or decisions (if there were any) might make easier the task before us, but the absence thereof does not relieve us of the duty of finding and declaring the governing law of Texas and the forty other states of the Union in which a tort is alleged to have been committed by appellee in the use of appellant's picture for the purpose of advertising beer. If in any of those forty-one states a tort was committed as alleged, the amount of damages proximately resulting therefrom should have been submitted to the jury.

"The decision of the majority leaves the appellant without remedy for any non-libelous use made of his picture by advertisers of beer, wine, whiskey, patent medicines, or other non-contraband goods, wares, and

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[3] Cf. *Funk* v. *United States*, 290 U. S. 371, 383.

[4] Cf. *Hurtado* v. *California*, 110 U. S. 516, 530.

merchandise. It also places every other famous stage, screen, and athletic star in the same situation.[5] If one is popular and permits publicity to be given to one's talent and accomplishment in any art or sport, commercial advertisers may seize upon such popularity to increase their sales of any lawful article without compensation of any kind for such commercial use of one's name and fame. This is contrary to usage and custom among advertisers in the marts of trade. They are undoubtedly in the habit of buying the right to use one's name or picture to create demand and good will for their merchandise.[6] It is the peculiar excellence of the common law that, by general usage, it is shaped and moulded into new and useful forms.

"Appellant's pleadings allege facts that entitle him to recover for either a violation of his right of property or right of privacy, and because the court does not think he is entitled to recover for the latter does not relieve us of the duty of deciding whether or not any right of property was violated. He alleges that he has never given any person, firm, or corporation any right or permission to use or display his picture in the way it was used, and alleges further that its use by the appellee was in wanton disregard of 'the rights or privacy of this plaintiff.'

"The facts out of which the law of this case arises were alleged in the complaint. It appears therefrom that the appellee committed a tort in misappropriating a valuable property right of appellant. Even if forms

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[5] Sergeant York is a nationally famous person, but no one would argue that his name or picture might be used commercially without his consent. Such an argument would be *reductio ad absurdum*.

[6] Illustrative of the value of the use of one's picture for advertising purposes, Gene Tunney says:

> "While I was training for my second fight with Jack Dempsey I was offered $15,000 to endorse a certain brand of cigarettes. I didn't want to be rude, so, in declining, I merely said I didn't smoke. Next day the advertising man came back with another offer: $12,000 if I would let my picture be used with the statement that 'Stinkies must be good because all my friends smoke them.'" (This offer was also refused.) Reader's Digest for December, 1941, page 23.

of action were not abolished, the appellant might seek damages for the tort or waive the tort and sue upon an implied promise to pay the reasonable value of the right appropriated. Appellant has not sought the wrong relief. He was not required to plead the law (ordinarily it is improper to do so); he was only required to state the ultimate facts upon which he relied for relief. If a litigant pleads the wrong law, it is the court's duty nevertheless to apply the correct law to the facts of the case. This was true even before the new rules, and it is doubly true since their adoption. The plaintiff's attorneys did not err in seeking alternative relief.

"Unless the judgment of the court below is modified so as to dismiss this action without prejudice, there can be no doubt that, if appellant brings another suit, he will be met with a plea of res adjudicata, which will probably be sustained; but, if not sustained, appellant would be put to great and unnecessary expense and court costs merely because of a mistake as to the special character of the legal wrong done him by the appellant. One who sues for damages for a tort does not endorse or condone the wrong, regardless of the form in which he may seek damages therefor.

"Because a peremptory instruction was given to the jury to find for the defendant, I respectfully dissent from the opinion of the majority upholding the judgment of the district court."

While we realize there is a conflict upon the law of recovery concerning the invasion of the right of privacy, yet we believe the weight of authority is in favor of recovery for same and we cite the following cases both for and against petitioner's contention:

States Recognizing Right of Privacy:

California

Melvin v. *Reid*, 112 Calif. App. 285, 297 P. 91 (1931);
Mau v. *Rio Grande*, 28 F. Supp. 845 (N. D. Calif.);
Metter v. *Los Angeles Examiner*, 95 P. (2) 491 (1940).

Georgia

Pavesich v. *New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68;
Bazemore v. *Savannah Hospital*, 155 S. E. 194 (1934, Sup. Ct.).

Kansas

Kunz v. *Allen*, 102 Kans. 883, 172 Pac. 532 (1918) (Motion pictures of plaintiff shopping in defendant's store).

Kentucky

Brents v. *Morgan*, 221 Ky. 765, 299 S. W. 967 (1927), 55 A. L. R. 964 (placarding delinquent debtor);
Foster-Milburn v. *Chinn*, 120 S. W. 364;
Jones v. *Herald Post Co.*, 18 S. W. (2) 972.

Louisiana

Itzkovitch v. *Whitaker*, 39 So. 499 (suit to enjoin placing plaintiff's picture in rogue's gallery).

Massachusetts (Fed. Court)

Corliss et al. v. *E. W. Walker*, (1894) 64 F. 280 (57 F. 434);
Levyeau v. *Clements*, 56 N. E. 735, 50 L. R. A. 397;
Themo v. *New England Newspaper Pub. Co.*, 27 N. E. (2) 753 (1940).

Missouri

Munden v. *Harris*, 134 S. W. 1076 (Ct. of App.)—(plaintiff's picture used by defendant for advertising purposes).

New Jersey

Vanderbilt v. *Mitchell*, 63 Atl. 1107.

New York (by statute)

Civil Rights Law, Secs. 50, 51.

North Carolina

Flake v. *Greensboro News Co.*, 195 S. E. 55.

Pennsylvania

Harlow v. *Buno Co.*, 36 D. & C. 101 (1940) (unauthorized use must be intentional).

South Carolina

Holloman v. *Life Ins. Co. of Virginia*, 7 S. E. (2) 169, Sup. Ct. 1940—dictum.

States Not Recognizing Right of Privacy:

Michigan

Atkinson v. *Doherty & Co.*, 121 Mich. 372, 80 N. W. 285.

Rhode Island

Henry v. *Cherry & Webb*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991.

Washington

Hillman v. *Starr Publishing Co.*, 117 Pac. 594.

Wisconsin

Judevine v. *Benzies-Montague Fuel & Whse. Co.*, (1936) 269 N. W. 295.

Leading cases also recognize the right of recovery for the use of one's photograph for advertising purposes, and among them being the following:

The case of *Lahiri* v. *Daily Mirror*, 295 N. Y. Supp. at page 388, recognizes:

> "Recovery may be had under the statute if the photograph is published in or is a part of the advertisement or for advertising purposes."

Likewise the same principle is established in the case of *Fisher* v. *Rosenberg*, 23 N. Y. Supp. (2) at pp. 678-9, and this case establishes the fact that the unlawful use of one's picture is prohibited unless "it was in connection with his profession". In that case plaintiff's picture was used with that of Irene Castle in an advertisement concerning the sale of "Miles Shoes". The advertisement did not refer to the name of the plaintiff, although it was the picture of the plaintiff in that case. The court finally concluded with the following significant language:

> "As member of a team of professional dancers for a period of years the publicity attached to the publication of his picture would undoubtedly inure to his benefit, provided it was in connection with his profession. In the instant case, however, it was used 'for the purposes of trade' in shoes, by reason of which he suffered humiliation and distress of mind."

The case of *Flake* v. *Greensboro News Co., supra*, by the Supreme Court of North Carolina, establishes the right of one to recover for the unauthorized use of his photograph for commercial purposes, and we quote paragraph 22 of the opinion, at page 64, as follows:

> "We are of the opinion that the reasoning in the Pavesich case, supra, is sound and establishes the correctness of the conclusion that the unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action which would entitle the plaintiff, without the allegation and proof of special damages, to a judgment for nominal damages, and to injunctive

relief, if and when the wrong is persisted in by the offending parties.

"One of the accepted and popular methods of advertising in the present day is to procure and publish the indorsement of the article being advertised by some well-known person whose name supposedly will lend force to the advertisement. If it be conceded that the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used for such a purpose without the consent of the owner without giving rise to a cause of action."

Conclusion.

Although this is a controversy between private parties, yet it does involve a very important question, and such, in our opinion, as should be settled by the Supreme Court.

Respectfully submitted,

ROBERT G. STOREY,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

October Term, 1941

NO. 972

DAVID O'BRIEN, *Petitioner*

vs.

PABST SALES COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1941

NO. 972

DAVID O'BRIEN, *Petitioner*

vs.

PABST SALES COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Supreme Court of the United States:

Comes now Pabst Sales Company, hereinafter styled Respondent, and, replying to the application for writ of certiorari on file herein, respectfully shows:

OPINIONS OF CIRCUIT COURT OF APPEALS

The majority and minority opinions of the Circuit Court of Appeals are found in the Record at pages 68 to 76.

JURISDICTION

The Supreme Court should not take jurisdiction of this case (a) because there is no conflict of authority upon any important question of law involved herein; (b) because there is no conflict between the majority and the dissenting opinions of the Circuit Court of Appeals herein, the majority opinion specifically refraining from expressing any opinion on the matter dealt with in the dissenting opinion; (c) because at all events the case was correctly decided upon its undisputed facts; and (d) because the case does not involve any disputed question of law possessing great public importance.

QUESTIONS PRESENTED

1. Whether the respectful publication of the photograph of a famous public character of national notoriety in connection with an advertisement containing no false statement is actionable.

2. Whether such public character has a cause of action for such reproduction of his photograph where he has posed for such photograph for publicity purposes and has, in fact, expressly and impliedly authorized Texas Christian University to distribute such photograph to the public generally without limitation upon its use, and where the photograph in question was in fact obtained from Texas Christian University and paid for in regular course without limitation upon its use.

3. Whether under the law of Texas Petitioner can recover for mere embarrassment or injured feelings, there being no pleading or proof of any injury to his person, property, or reputation.

STATEMENT OF THE CASE

(a) The basis of Petitioner's suit is an alleged invasion of his right of privacy. (R. pp. 1-5). As stated in the majority opinion (R. p. 73), throughout the pleadings, record and brief, Petitioner has uniformly stood on the position that his suit is for invasion of privacy. The theory of quantum meruit is not, in fact, the case brought and pursued by Petitioner, but is suggested for the first time in the minority opinion. The majority opinion expressly refrains from expressing any opinion on the matter dealt with in the dissenting opinion (R. p. 73), and there is, therefore, no real conflict between the two opinions upon any important question of law.

(b) Petitioner was a famous public character of nationwide notoriety, being the outstanding and most publicized football player of the year 1938-39. In 1938 he was generally recognized as the leading college football player of the year and thereafter continued his football career as a professional player. Petitioner, who testified fully by deposition, recited in detail his fame and his numerous national trophies and awards, including among others several as the outstanding football player of the United States, membership on nearly every All-American football

team of the country, including the famous Grantland Rice All-American team depicted on the calendar in question, and also a plaque as the best football player that ever lived. His name and picture appeared universally in the newspapers, magazines and sports journals of the nation. (R. pp. 1-3, 4-6, 9, 10, 21, 26-30, 50, 51, 57-59.)

(c) Petitioner expressly and impliedly authorized the distribution of the pictures in question to the public generally without restraint as to their use. During the four years that Petitioner attended and played football there, Texas Christian University maintained under its jurisdiction a publicity department, called the "News Service." The functions of said publicity department were to furnish facts, stories, and information concerning football activities of the University team, and pictures and biographical data concerning the players to news services, newspapers, magazines, football fans, or any member of the public who might ask for same, and no questions were asked as to what was wanted with the picture and no restrictions were placed upon the use to be made of same. This publicity promotion was good for the school, the team, and the individual players, the testimony being that such publicity is a help to the individual football player because it brings him credit in the public eye, and that in recent years, in the development of professional football, it has had considerable bearing on the player's opportunities in that field. This publicity department alone furnished more than 700 or 800 photographs of petitioner with biographical data to

various nationwide press associations, sports editors, magazines, and members of the public, all for publicity purposes. Petitioner posed for numerous football pictures for publicity purposes, including the very pictures on the calendar in question, and numerous similar pictures. Petitioner was familiar with the activities of said publicity department, and expressly and impliedly authorized same. (R. pp. 26-30, 50-52, 57-61). The pictures of Petitioner appearing on the calendar in question were obtained by writing to said publicity department and paying for same in regular course. No restriction whatever was placed upon the use of same. (R. pp. 35-47).

(d) Petitioner complains that Respondent used his picture in football uniform on what is known as the "Pabst Blue Ribbon Football Calendar of 1939." His picture appeared thereon by reason of his having been selected a member of the famous Grantland Rice All-American Football Team of 1938, the pictures of other members of said team likewise appearing thereon. Being the most famous collegiate football player of the year, Petitioner was given prominence on the calendar by placing his picture in his famous and characteristic pose of executing a forward pass in the upper left-hand corner of the calendar. The bulk of the calendar was taken up with an elaborate schedule of football games played by the most prominent collegiate teams of the country in the season of 1938 (with scores) and to be played by such teams in the season of 1939 (with blanks for scores to be inserted). Also, the

calendar contained a schedule of the National Football League for the season 1939. A bottle of Pabtst beer and a can of Pabst beer were pictured on one corner of the calendar, and the name "Pabst Blue Ribbon Beer" appears on the margin at the top and bottom of the calendar. The calendar is a special kind of calendar—a football calendar. Perhaps nine-tenths of its space and content is devoted to football. (R. p. 37). The calendar contains no false or libelous statement. It contains no endorsement of Pabst beer by Petitioner or any other member of the team. It contains no commendation of the beer at all. It does not say that Petitioner or any other member of the team drinks Pabst beer. It merely publishes a schedule of football games. By distributing same, Respondent was simply seeking to promote good will by courting the favor of the vast football public, and in effect was merely saying, "Here is a football calendar with the compliments of Pabst." There is no evidence in the record that any human being was led to believe by the calendar that Petitioner either endorsed or drank Pabst beer. (R. 6, 37).

(e) No injury is pleaded or proven to Petitioner's person, property or reputation. The only evidence of any injury to him is his assertion that he was "embarrassed and humiliated" when he saw the calendar. (R. pp. 1-5, 15, 22, 23, 24).

ARGUMENT

First Question Presented

See majority opinion of the Circuit Court of Appeals (R. p. 68) which for brevity we do not quote.

It is true the authorities are in conflict as to whether there exists at common law a cause of action for the mere invasion of the privacy of a private person. Petitioner claims a majority of the states on his side, but some half dozen of the states and some twelve of fourteen of the authorities listed by him do not in fact support this claim. See Note 1.

NOTE 1. Petitioner confuses cases easy to find in the books, such as **Edison v. Edison Polyform Manufacturing Company,** 67 A. (N. J.) 392; **Foster-Milburn v. Chinn,** 120 S.W. (Ky.) 364, where the publication of the photograph contained false statements or forged endorsements; or such as **Metter v. Los Angeles Examiner,** 95 P. (2d) 491; **Levyeau v. Clements,** 56 N.E. (Mass.) 735; **Bazemore v. Savannah Hospital,** 155 S.W. (Ga.) 194, where the photograph was surreptitiously obtained, or its reproduction constituted a breash of contract or of fiduciary obligation; or such as **Lahiri v. Daily Mirror,** 295 N.Y. Sup. 388; **Fisher v. Rosenberg,** 23 N.Y. Sup. (2d) 677, in which recovery is based upon an express statute specifically creating the cause of action; or cases such as **Melvin v. Reid,** 297 P. (Cal.) 91; **Mau v. Rio Grande Oil Co., Inc.** 28 Fed. Sup. (Cal. Dist. Ct.) 845; **Metter v. Los Angeles Examiner,** supra, where recovery was based upon express provision of the state constitution creating the cause of action; or where, as in **Itzkovitch v. Whitaker,** 39 So. (La.) 499; **Vanderbilt v. Mitchell,** 63 A. (N. J.) 1107; **Edison v. Edison Polyform Manufacturing Co.,** supra; **Melvin v. Reid,** supra; **Holloman v. Life Insurance Company of Virginia,** 7 S. E. (2d) (S. C.) 169; and **Themo v. New England Newspaper Publishing Co.,** 27 N.E. (2d) (Mass.) 753, no right of privacy was involved at all, or where for any of the above or other reasons the court expressly declined to decide whether such a cause of action exists at common law. Thus there remains on Petitioner's side of the above question only the states of Georgia, Kansas, Kentucky, Missouri, North Carolina, and South Carolina (by dictum). In all cases cited by Petitioner from said states except **Foster-Milburn v. Chinn,** supra, (forged endorsement), Plaintiff was a private person and not a public character. Hence, Petitioner's cases do not govern this case.

On the other hand, New York, Rhode Island, Washington, Michigan, and Wisconsin expressly rejected the existence of a common law cause of action for the invasion of the mere privacy even of a private person,

However, the above conflict of authority is academic because there is no conflict of authority upon the question actually involved in this case. States which accept as well as those which reject the common law privacy doctrine all uniformly deny its application where complaining party is a public character of national notoriety or has expressly or impliedly invited or consented to publicity. We have discovered no case in which the court has applied the common law privacy doctrine to a public character having a national reputation. Among the decisions recognizing the public character exception are many of the decisions cited by Petitioner, as well as others. See *Corliss v. E. W. Walker*, 64 F. (Mass.) 280; *Sidis v. F-R Publishing Corporation*, 113 F. (2d) 806, (certiorari denied by the United States Supreme Court in 85 L. Ed. 279); *Jones v. Herald Post Co.*, 18 S.W. (2d) (Ky.) 972; *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68; *Edison v. Edison Polyform Manufacturing Co.*, supra; *Themo v. New England Newspaper Publishing Co.*, supra; *Melvin v. Reid*, supra; *Metter v. Los Angeles Examiner*, supra; *Munden v. Harris*, 134 S. W. (Mo.) 1076; *Brents v. Morgan*, 299 S.W. (Ky.) 967; *Hanna Manufacturing Co. v. Hillerich & Bradsby Co.*, 78 F. (2d) 763 (certiorari denied by the United States Supreme Court 80 L. Ed. 458); *Para-*

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and California and Massachusetts have specifically expressed doubt as to the existence of such common law cause of action. See **Roberson v. Rochester Folding Box Co.**, 64 N. E. (N. Y. C.C.A.) 442; **Henry v. Cherry & Webb**, 73 A. (R. I.) 97; **Hillman v. Star Publishing Co.**, 117 P. (Wash.) 594; **Atkinson v. John E. Doherty & Co.**, 80 N. W. (Mich.) 285; **Judevine v. Benzies-Montayne Fuel & Warehouse Co.**, 269 N. W. (Wis.) 295. The rule in Texas is undetermined either by decision or statute.

mount Pictures v. Leader Press, 24 F. Sup. (Ok.) 1004; *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. (Dist. Co. Mo.) 982.

And the fact that the name and picture of the famous character were used in connection with an advertisement—that is to say, were used to lend interest and attractiveness to a football calendar intended to promote good-will for Respondent's product—does not give rise to a cause of action, provided the publication does not contain any false statement. Thus in thirteen of the authorities above mentioned, to wit: *Roberson v. Rochester Folding Box Company; Henry v. Cherry & Webb; Atkinson v. John E. Doherty & Co.; Pavesich v. New England Life Insurance Co.; Corliss v. E. W. Walker Co.; Munden v. Harris*; *Sidis v. F-R Publishing Corporation; Hanna Manufacturing Co. v. Hillerich & Bradsby Co.; Paramount Pictures v. Leader Press; Melvin v. Reid; Themo v. New England Newspaper Publishing Co.; Vassar College v. Loose-Wiles Biscuit Company;* and *Edison v. Edison Polyform Company*, the name or picture was used for advertising or commercial purposes, or for the purpose of business gain. The first three of said decisions were decided in jurisdictions which reject the privacy doctrine; the remaining ten in jurisdictions which recognize, or are claimed by Petitioner to recognize, the privacy doctrine. Yet even in the latter cases the above stated exception with respect to a public character is uniformly and explicitly recognized.

The minority opinion erroneously assumes that the mere use of the picture in connection with an advertisement creates a cause of action even though the subject of the picture is a national public character and the advertisement contains no false statement.

It is uniformly held that where, as here, Petitioner by his activities over a period of years sought and invited the interest, applause and patronage of the public and became a public character of national notoriety, his name and picture became, so to speak, a public possession and he no longer retained the right of an ordinary private person to the exclusive use of his picture, and any member of the public had a right to reproduce same provided, as in this case, the reproduction contained no libel or false statement, and the picture was not obtained surreptitiously or reproduced in breach of any contract or fiduciary obligation; and the fact that the name and picture of such famous character are used in connection with an advertisement, that is, to lend interest and attractiveness to a calendar intended to promote good-will for Respondent's product, does not make a case.

Petitioner complains, however, that Respondent is engaged in the business of selling beer, and that the calendar was hung in some saloons. A football star whose likeness has become the possession of the public, cannot choose what members of the public may reproduce it, or the place where its reproduction may be hung. Respondent is as much privileged to reproduce it as would be the Coca Cola Company,

or the manufacturer of Wheaties, "the food of champions," or any other member of the public. The pictures of the President may be found in many saloons. Yet this could not be regarded as a disrespect or as a representation that the President is a beer addict or that he endorses the product of that saloon. The calendar contains no endorsement, express or implied, by the members of the team depicted thereon. In fact, the calendar contains no commendation of the beer by any one at all. And there is no evidence in the record whatever that any human being concluded from the picture that the Petitioner endorsed Pabst beer or was a Pabst beer drinker.

Second Question Presented

The undisputed evidence is that Petitioner expressly and impliedly authorized the distribution of his picture by Texas Christian University, and that is where the pictures in question were obtained. There was no restriction on the authority of the University to distribute the pictures, and no restriction was placed upon the use of same when obtained from the University. See subdivision (c) of Statement of the Case herein. This is a complete, independent defense regardless of any other question in the case, and is entirely overlooked in the minority opinion.

Third Question Presented

No injury to Petitioner's person, property, or reputation, and no actual damages of any character are pleaded or proven. The Texas decisions incontestably establish the rule in Texas that in a case of this character there can be no recovery for mere embarrassment or injured feelings. See *Gulf, Colorado & Santa Fe R. R. Co. v. Trott*, 25 S.W. (Tex. Sup. Ct.) 419; *Davis v. Grantham*, 295 F. (5th Circuit), 132; *Williams v. Yoe*, 46 S.W. (Tex. Civ. App.) 659; *Michels v. Boruta*, 122 S.W. (2d) (Tex. Civ. App.) 216; *State National Bank of Iowa Park v. Rogers*, 89 S.W. (2d) 825; *Ferguson v. Houston Press Co.*, 1 S.W. (2d) (Tex. Civ. App.) 387, affirmed 12 S.W. (2d) 125.

CONCLUSION

There is no real conflict of authority upon any important question of law actually involved in this case. In any event, the case was correctly decided upon its undisputed facts.

Respectfully submitted,

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